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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LOUIS SZTAN,

Petitioner,

VS.

DEPARTMENT OF THE NAVY,

Respondent.

SUPPLEMENTAL APPENDIX

RICHARD MURRAY
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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF THE ADMINISTRATIVE LAW JUDGE

LOUIS SZTAN, *Appellant,*	)	DOCKET NUMBER DC04328610498
v.	)	
DEPARTMENT OF THE NAVY, *Agency.*	)	DATE: December 29, 1986

RICHARD MURRAY, ESQUIRE MURRAY & PIETROVITO, Fairfax, Virginia, for the appellant.

SYLVIA EUGENE ANDERSON, Esquire for the agency.

BEFORE

Paul G. Streb
Administrative Judge

DECISION

INTRODUCTION

On August 28, 1986, Dr. Louis Sztan filed an appeal from the decision of the Department of the Navy, Naval Air Systems Command (NAVAIR), to remove him from the federal service effective August 15, 1986. The removal action was taken pursuant to 5 U.S.C. Section 4303(a) for unacceptable performance. The appeal is within the juris-

diction of the Merit Systems Protection Board. See 5 U.S.C. Section 4303(e).

The agency's decision is AFFIRMED.

ANALYSIS AND FINDINGS

Background

Appellant was employed as a General Engineer, GM-14, in the Engineering Support and Product Integrity Management Division, Assistant Commander for Systems and Engineering, NAVAIR. As Senior Value Engineer, he was responsible for managing and coordinating NAVAIR's value engineering program to assure that naval aircraft and related systems and equipment were developed and produced at the lowest overall cost. Agency File (AF), tab 2.

On January 6, 1986, appellant's supervisor, Richard A. Findley, issued an interim appraisal of appellant's performance. Agency Hearing Exhibit 1. Appellant was rated unsatisfactory on his performance of the duties related to the first critical element of his position; he was rated "marginal to unsatisfactory" on his performance of the duties related to his second and third critical elements. On March 20, 1986, Findley issued appellant a notice of unacceptable performance regarding his first three critical elements. AF, tab 5. The notice advised appellant that he would have 60 days to demonstrate acceptable performance.

On June 13, 1986, Findley issued appellant a notice proposing to remove him from federal services based on his unsatisfactory performance during the 60-day performance improvement period. AF, tab 8. Following appellant's written and oral replies to the proposal notice, AF, tabs 9, 10, Admiral John F. Calvert, Assistant Commander for Systems and Engineering, issued a decision on August 5, 1986, to remove appellant based on the reasons specified in the proposal notice, AF, tab 11.

Bases For Removal Action

Paragraph 3(a) of the proposal notice alleged that appellant unsatisfactorily performed duties relating to his third critical element, which required him to advise NAVAIR and contractors regarding value engineering policy and practices. The minimum performance standard for that critical element required appellant to:

> Provide timely and satisfactory support. Execute all communications in a manner conducive to gaining support for value engineering objectives, building positive working relations, and whenever possible, developing a consensus course of action.

AF, tab 6. Paragraph 3(a) alleged specifically that appellant failed in several attempts to draft an acceptable memorandum for record concerning a meeting between agency officials and a contractor (Grumman) on the status of the contractor's value engineering program.

Findley testified and stated in his detailed proposal notice that appellant's first draft of the memorandum was unacceptable, he gave appellant instructions for revising it, appellant failed to comply with those instructions in revising the memorandum, and, after several unsuccessful attempts by appellant to revise the memorandum, he (Findley) rewrote it. Findley's version is supported by appellant's various drafts of the memorandum and Findley's comments thereon and written instructions to appellant.

Appellant testified that he did not draft a detailed memorandum because the purpose of the memorandum was merely to refresh the memory of the attendees, and that he did not include an attendee list because he had already sent such a list to all attendees. He testified that Findley's instructions were not sufficiently detailed, and that an adversary relationship had developed between him and Findley.

Based on my review of the documents in question, AF, tab 7, I find that Findley's instructions were very specific and detailed, and they should have put appellant on notice of what was expected in the memorandum. In his instructions, Findley explained his objections to appellant's draft memorandum and even gave some examples. His notes reflect that he wanted the attendee list attached to the memorandum so the agency's records would be clear. Findley's instructions also reflect that he wanted the memorandum to be detailed and accurate. It is clear from a review of the documents in question that appellant failed in several attempts to comply with Findley's instructions. As to the adversary relationship that appellant feels had developed between him and Findley, I note that disputes between supervisors and subordinates over alleged performance deficiencies "can scarcely avoid involving clashes of personalities." Arnett v. Kennedy, 416 U.S. 134, 155 n.21 (1974). I find the allegations in paragraph 3(a) to be supported by substantial evidence. See 5 C.F.R. Section 1201.56(c) (1).[1]

Paragraph 3(b) of the proposal notice alleged that appellant unsatisfactorily performed duties relating to his second critical element, which required him to analyze procurement requests and value engineering change proposals and to provide technical, economic, and contractual recommendations to appropriate NAVAIR components. The minimum performance standard for that critical element provided as follows:

> Evaluate value engineering change proposals and procurement documents in technically sound and timely manner consistent with NAVAIR policy (including tar-

[1] On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. For ease of reference, citations will be to the Board's regulations at 5 C.F.R. Part 1201. However, parties should refer to 51 Fed. Reg. 25,146-72 (1986) for the text of all references to this part.

> get times). Communications within and outside NAVAIR necessary to complete evaluation are made in a professional manner engendering support for the value engineering program.

AF, tab 6. Paragraph 3(b) alleged specifically that appellant incorrectly interpreted value engineering rules as applies to a value engineering change proposal submitted by Texas Instruments, and that he erroneously determined that a piece of contractor-furnished equipment was government-furnished equipment. It was alleged further that appellant impeded the timely approval of the change proposal. Findley testified in support of these allegations and recounted the events in detail in the proposal notice. See DePauw v. International Trade Commission, 782 F.2d 1564, 1567 & n.8 (Fed. Cir. 1986). His testimony was supported by his notes regarding his conversations with agency officials on this matter and memoranda from them. The testimony and documentary evidence show that the officials concurred in Findley's judgment that appellant had erred in this matter. According to the contracting officer, the equipment in question was furnished by the contractor, and failure to approve the change proposal would have resulted in a missed opportunity to save the government several hundred thousand dollars. Agency Hearing Exhibit 2.

In his testimony, appellant admitted that he made an error in this matter, but he denied that he intentionally impeded the timely approval of the change proposal. He testified that any delay on his part was caused by his need to study a matter related to the change proposal. However, regardless of appellant's intent, his action was not timely. Findley stated that despite being informed of the urgency of the matter in January 1986, appellant delayed action until April 1986. In view of appellant's admission of error, the testimony of Findley, and the supporting views of other agency officials, I find that there is substantial evidence to support these allegations.

Paragraph 3(c) of the proposal notice alleged that appellant unsatisfactorily performed duties relating to his first critical element, which required him to implement policy and procedures in response to Department of Defense, Chief of Naval Material, and NAVAIR directives and policy initiatives. The minimum performance standard for that critical element required appellant to provide timely, technically competent, and complete responses to requests for support. AF, tab 6.

Paragraph 3(c) alleged specifically that several items of correspondence which appellant submitted for Findley's signature contained numerous errors and required significant rewriting. Findley testified in support of this allegation, and the record contains copies of the correspondence in questions and Findley's critiques of that correspondence. Findley testified that he instructed appellant to prepare letters to certain nominees who had not been selected for awards. However, it is evident from appellant's draft letter that it did not advise them of their nonselection.

Findley faulted appellant for naming a contractor in another draft letter while competition for the contract was still in progress. Appellant testified that there had been an oral agrement to extend the contract with the contractor he had named until a new contract was awarded upon completion of formal competition. However, in view of the possibility of misinterpretation by someone without complete knowledge of the situation, I agree with Findley's position on this matter. Therefore, I find these allegations to be supported by substantial evidence.

Paragraph 4 of the proposal notice alleged that appellant's performance regarding his third critical element was unsatisfactory in that he failed to make many of the substantive changes which Findley had recommended for a value engineering guidelines document, and that the changes which appellant did make were flawed. These al-

legations were supported by Findley's testimony and detailed recommendations which he gave appellant in this matter. Findley testified that appellant never completed this task.

Although appellant argued that the document which he submitted to Findley was satisfactory, I find that appellant clearly had a duty to comply with his supervisor's instructions to make changes. Moreover, as the division director, Findley was in a better position to judge whether appellant had generated a document acceptable for issuance by the division. See Baker v Defense Logistics Agency, 782 F.2d 1579, 1582 (Fed. Cir. 1986); Martin v. Federal Aviation Administration, 795 F.2d 995, 997 (Fed. Cir. 1986). I find these allegations to be supported by substantial evidence.

Paragraph 5 of the proposal notice alleged that appellant's performance regarding his first critical element was unsatisfactory in that he failed to perform one of his assigned tasks—preparation of a written plan to improve the management of value engineering within NAVAIR. Appellant admitted that he did not perform this tasks, but he testified that he did not have enough time to complete it in view of his other assignments. He also testified that Findley never discussed this task with him or prioritized his various tasks, and that NAVAIR had no immediate need for such a plan.

I find no merit in these arguments. If appellant believed he could not complete the task because of other assignments, he should have so advised Findley in a timely manner. However, appellant did not do so until the time limit for completing the task had expired. In view of the relatively high level of appellant's position and the fact that he was supposed to perform his duties in an autonomous manner, AF, tab 2, Findley certainly had no duty to prioritize appellant's tasks or give him detailed guidance on the preparation of the plan. Moreover, there is no evidence that appellant asked for guidance. Appellant's view that

NAVAIR had no immediate need for a plan to improve the management of value engineering does not excuse his failure to comply with instructions from his supervisor, who was in a better position to determine NAVAIR's needs. I find that there is substantial evidence to support this allegation.

Paragraph 6 of the proposal notice alleged that appellant's performance regarding his first critical element was unsatisfactory in that he failed to submit an accurate report on the status of value engineering change proposals with NAVAIR. Findley testified that there were numerous errors in the report, and that, consequently, issuance of the report was delayed for 2 weeks. Appellant's testimony was somewhat unclear, but he seemed to blame the errors on the submission of erroneous data to him by other persons and on the fact there those persons were not always present at work when he called to obtain data from them.

I agree that appellant should not be held responsible for matters not within his control. However, it is unclear from appellant's vague testimony whether that was the case. Appellant has not given any specific examples of instances where he was provided erroneous data which he had reason to believe was correct, and he has not explained why he could not have obtained the data from other persons when the persons he called were absent. I find this allegation to be supported by substantial evidence.

Paragraph 7 of the proposal notice alleged that appellant's performance regarding his second critical element was unsatisfactory with respect to his performance of an assignment to prepare memoranda to program managers and division directors who had value engineering change proposals in the command for more than 90 days. The time limit for completing action on such proposals was 45 days. Findley testified and stated in his detailed proposal notice that appellant initially based the memoranda on an outdated status report; although appellant prepared new

memoranda , he neglected to issue them during Findley's absence; and the new memoranda contained numerous errors, for example, errors in coding and omission of some of the change proposals that were in process.

Appellant did not contest Findley's assertions that the initial memoranda were based on an outdated status report, and that the final memoranda contained errors. However, he testified that he recommended to Findley's deputy that the memoranda not be issued because the offices in question were actively working the change proposals, and nothing would be gained by sending the memoranda. He testified that Findley's deputy agreed with his recommendation and told him not to issue the memoranda.

Although appellant had been tasked by Findley to issue the memoranda, appellant's high-level position certainly gave him the latitude to make a recommendation to the person in charge of the office in Findley's absence if he believed that the circumstances at the time did not warrant issuance of the memoranda. There was no evidence that appellant misrepresented anything to Findley's deputy. As the deputy agreed with appellant and told him not to issue the memoranda, I do not find that this allegation is supported by substantial evidence. However, I find that Findley's uncontested testimony and supporting documentation constitute substantial evidence to support the other two allegations in paragraph 7 of the proposal notice.

Appellant's Defense

Appellant raised several defenses in his petition for appeal and his post-hearing brief. Although appellant contends that the penalty of removal is unduly harsh, the Board has no authority to mitigate penalties imposed pursuant to 5 U.S.C. Section 4303(a) in unacceptable performance cases. The Board can only affirm or reverse the agency's action. Lisiecki v. Merit Systems Protection Board, 769 F.2d 1558 (Fed. Cir. 1985).

Appellant contends that his performance standards were vague, subjective, and arbitrary, and that in some cases his performance was judged on the basis of new criteria. The latter contention apparently pertains to the fact that Findley gave appellant several assignments during the 60-day performance improvement period.

I do not find appellant's performance standards to be vague or arbitrary, especially in view of the fact that Findley gave appellant numerous specific instructions regarding his tasks. See Shuman v. Department of the Treasury, 23 M.S.P.R. 620, 626-27 (1984). Although the standards permit subjective judgments, I find nothing improper in that regard in view of the nature of appellant's position. See id.; Jackson v. Environmental Protection Agency, 770 F.2d 1048, 1056 (Fed. Cir. 1985). Moreover, I find nothing improper regarding Findley's assignments to appellant during the performance improvement period because they all pertained to his critical elements.

Appellant next contends that the performance improvement period was too short to enable him to demonstrate acceptable performance. However, I find that appellant had ample opportunity to improve. He had 60 days to demonstrate acceptable performance, and he was given several important tasks during that period.

Appellant next contends that Findley exceeded his authority in this matter and failed to "recognize appellant's duties as provided in his job description." Although this contention is somewhat unclear, I find that Findley, as appellant's supervisor and division director, certainly had authority to give him assignments, evaluate his work performance, and propose his removal. There was no evidence of any agency restriction on Findley's authority. Further, I find that Findley "recognized" appellant's duties set forth in his position description in the sense that appellant's critical elements and work assignments were related to those duties.

Appellant next contends that the agency committed numerous violations of statutes and of his constitutional rights in conjunction with several events surrounding the removal action. Findley testified that when he first took over as division director in October 1985, John J. Bettino, who was deputy to Admiral Calvert (the deciding official), advised him of problems with appellant's performance and stated that he "ought to remove" appellant. Thus, appellant contends, his removal was predetermined even before he began working for Findley.[2]

I find no merit in this contention. Findley testified that he responded to Bettino's recommendation by stating he would not take any action concerning appellant until he had an opportunity to evaluate his performance. Findley's subsequent actions are consistent with that testimony, and they did not show that he had prejudged appellant's performance. Findley gave appellant more than adequate warning there were problems with his performance. Prior to issuing the March 20, 1986 notice of unsatisfactory performance, which began appellant's formal performance improvement period, Findley gave appellant an interim appraisal on January 6, 1986, which advised him of performance deficiencies. The fact that I have sustained virtually all of Findley's allegations of unsatisfactory performance shows that Findley made sound judgments on appellant's performance and did not simply propose his removal at Bettino's urging.

Appellant also contends that his statutory and constitutional rights were violated by Findley's action of engaging in oral and written ex parte communications with the deciding official, and by the agency's action of failing

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[2] Although it is undisputed that Bettino advised Findley of appellant's performance problems, there is conflicting evidence as to whether Bettino urged Findley to remove appellant. However, for purposes of appellant's contention, it is Findley's perception of the conversation that is important. Thus, I will accept his version.

to disclose the written ex parte communication during discovery in the present proceeding. Findley testified that he once asked Admiral Calvert while his decision was pending if he had reached a decision on appellant's proposed removal. On July 29, 1986, before Admiral Calvert had rendered a decision, Findley sent him a one-page memorandum alleging that appellant's performance continued to be deficient, and stating that, "It is no wonder that industry, per Jim Quinn's letter to VADM Wilkinson recently, thinks NAVAIR's responsiveness to [value engineering change proposals] is 'in the dark ages compared to one of the Army's Commands.' " The Memorandum set forth several examples of the alleged continuing performance deficiencies. Appellant's Hearing Exhibit 1. Appellant did not become aware of the memorandum until he deposed Findley during the present proceeding before the Board.

There is no statutory or regulatory prohibition on ex parte communications between proposing and deciding officials. Farris v. Department of the Air Force, 26 M.S.P.R. 299, 303 (1985), aff'd, 785 F.2d 323 (Fed. Cir. 1985) (unpublished opinion). Whether such communications are improper depends on the circumstances of each case.

Although I find nothing improper in Findley's single question to Admiral Calvert as to whether he had made a decision, it is clear that Findley improperly conveyed in his memorandum to the deciding official new allegations and information which appellant had no opportunity to review and respond to. See Anderson, v. Department of State, 27 M.S.P.R. 244, 349 (1985). However, I do not find that the deciding official was influenced by the new allegations and information in making his decision. See id. Admiral Calvert testified that he did not consider the memorandum in reaching his decision because it covered matters which were not in the proposal notice, and he knew it would have been improper for him to consider such matters. In my judgment, Admiral Calvert was a very credible witness. He was sincere, straightforward, and con-

vincing, and there was no evidence in conflict with his testimony. Therefore, I find that his testimony deserves heavy weight.

Even assuming arguendo that Admiral Calvert considered the memorandum in reaching his decision, I would not find the error to be harmful. See id. In view of the numerous allegations of unsatisfactory performance in the proposal notice, it is unlikely that the limited new information in the memorandum would have had an impact on Admiral Calvert's decision.

Furthermore, the present case is clearly distinguishable from Sullivan v. Department of the Navy, 720 F.2d 1266 (Fed. Cir. 1983), in which a removal action was reversed because the court found that a true adversary with motives of reprisal toward an employee whose removal had been proposed sought to pressure the deciding official into making a decision to remove the employee. The Board has stated, interpreting Sullivan, that:

> In Sullivan the court specifically found that the third party who intervened had a motive of reprisal against Sullivan for his having filed a grievance against him and that the third party was an adversary in that he initiated the investigation [consisting of constant surveillance of Sullivan], actively and consistently participated in the case, and put pressure on the decision maker. It was the combination of these actions the Court found improper.

Farris v. Department of the Air Force, 26 M.S.P.R. 299, 302-03 (1985), aff'd, 785 F.2d 323 (Fed. Cir. 1985) (unpublished opinion). The fact that Findley was the proposing official did not make him an adversary of appellant. Id. There was no evidence that appellant had filed a grievance against Findley, or that Findley was "out to get" appellant for some other reason. See Chappelle v. Department of Labor, 27 M.S.P.R. 352, 354 (1985), aff'd 790 F.2d 91 (Fed. Cir. 1986) (unpublished opinion). Although there were

several ex parte communications made to the deciding official that Sullivan be removed, there was only one memorandum concerning appellant's continuing unsatisfactory performance in the present case. I find that Sullivan is inapposite to the present case.

Although the agency should have furnished Findley's memorandum to appellant's counsel sooner than it did during discovery in the present proceeding before the Board, I find no evidence that the agency improperly attempted to conceal the memorandum. In any event, appellant was not harmed by the delay because he was able to make extensive arguments regarding the memorandum in this proceeding. I conclude that appellant was not denied due process of law or deprived of the effective assistance of counsel, and that the agency did not commit a prohibited personnel practice with respect to the matters pertaining to the memorandum.

Although appellant contends that the agency failed to follow all of the statutory and regulatory requirements in effecting his removal, I find, after review and study of the entire record, that the agency has met its burden of proof on all required elements of this case. See Lovshin v. Department of the Navy, 767 F.2d 826, 834 (Fed. Cir. 1985) (en banc), cert. denied, 106 S. Ct. 1523 (1986). The agency set up an approved performance appraisal system. AF, tab 3. The agency communicated appellant's critical elements and performance standards to him at the beginning of his appraisal period, AF, tab 6; as discussed supra, Findley amplified those standards by giving appellant various instructions. See DePauw v. International Trade Commission, 782 F.2d 1564, 1566 (Fed.Cir. 1986). As discussed supra, Findley warned appellant of deficiencies in his performance for the critical elements in question, and he provided him reasonable opportunity to improve his performance. The agency proved numerous instances of

when appellant's performance failed to meet his performance standards for three of his critical elements.

Appellant's removal is AFFIRMED.